JMM Operational Services, Inc. *and* International Brotherhood of Teamsters, Local No. 627, AFL–CIO.[1] Case 33–CA–10307

January 20, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On August 22, 1994, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, JMM Operational Services, Inc., Pekin, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] Because we agree with the judge that the Respondent violated Sec. 8(a)(5) as of August 1, 1993, when the Respondent began its operations as a *Burns* successor, we find it unneccessary to address the judge's conclusion that the Respondent was in a position to voluntarily recognize the Union on July 20, 1993.

Valerie Ortique, Esq., for the General Counsel.
Frederick J. Bosch, Esq. (Stradley, Renon, Stevens & Young), of Philadelphia, Pennsylvania, for the Respondent.
Mr. Keith E. Gleason, of Peoria, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. Upon a charge filed by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 627 (the Union) on August 5, 1993,[1] a complaint was issued on September 13 alleging, as here pertinent, as follows:

[1] All dates in 1993 unless indicated otherwise.

2.

(a) At all material times, Respondent, a Colorado corporation, with an office and place of business located, inter alia, in Pekin, Illinois, herein called Respondent's facility, has been engaged in the business of operating wastewater treatment plants.

(b) About August 1, 1993, Respondent contracted with the City of Pekin, Illinois, herein called the City of Pekin, to operate and did begin operating the City of Pekin wastewater treatment plant and since then has continued to operate the wastewater treatment plant of the City of Pekin in basically unchanged form, and has employed as a majority of its employees individuals who were previously employees of the City of Pekin at said wastewater treatment plant.

(c) Based on the operations described above in paragraph 2(b), Respondent has continued the employing entity and is a successor to the City of Pekin.

. . . .

5.

[(a)] The following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees of Respondent employed at its wastewater treatment plant in Pekin, Illinois; but excluding professional employees, guards and supervisors as defined in the Act.

(b) Since a certain but unknown date prior to 1975, and at all material times, the Union has been the designated exclusive collective bargaining representative of the Unit and since said date, the Union has been recognized as the exclusive collective bargaining representative by Respondent's predecessor, the City of Pekin. This recognition has been embodied in a series of collective bargaining agreements between Respondent's predecessor, the City of Pekin, and the Union, the most recent of which was effective from April 1, 1993 through March 31, 1996.

(c) From about a certain but unknown date prior to 1975 to August 1, 1993, based on Section 9(a) of the [National Labor Relations Act [hereinafter referred to as the Act], the Union has been the exclusive collective bargaining representative of the unit employed by the City of Pekin.

(d) At all times since about August 1, 1993, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of Respondent's employees in the Unit.

(e) By verbal request on or about July 20, July 28 and August 4, 1993, the Union, by Keith Gleason, requested that Respondent recognize it as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

6.

Since about July 28 and August 1, 1993, Respondent has failed and refused to recognize and bargain with the

Union as the exclusive collective-bargaining representative of the Unit.

7.

By the conduct described above in paragraph 6, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1) and (5) of the Act.

Respondent denies violating the Act.

A hearing was held in Peoria, Illinois, on June 15, 1994. Upon the entire record in this case, including my observation of the demeanor of the witnesses and consideration of the briefs filed by counsel for General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, operates a wastewater treatment plant in Pekin, Illinois. The complaint alleges, the Respondent admits, and I find that at all times material, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Facts

The city of Pekin, Illinois (Pekin), a public employer, employed three groups of employees under five city commissions. As here pertinent, the wastewater treatment employees were included in the same unit as street department employees. For more than 20 years, the Union represented this unit of all employees in the sewage treatment plant and street department.

Larry Wolfer, who is a wastewater treatment plant employee, had worked for Pekin for over 23 years until August 1. Wolfer testified that he worked in the street department for about 9 years prior to winning a bid to move to the wastewater treatment facility;[2] that he worked first shift in the wastewater treatment facility along with three other employees, Mike Birkmeier, Bud Thomas, and Don Yavorshak; that Dominick Gasper, a working supervisor, was also a member of the Union; that he worked in the laboratory 3 days each week conducting tests to satisfy the Environmental Protection Agency (EPA) discharge permit requirements; that on the other 2 days he performed maintenance work in the plant; that he joined the Union in 1971; that in 1971 Pekin recognized a bargaining unit which included the wastewater treatment employees, along with the previously included street department employees; and that all of the wastewater treatment employees (except for one individual who was in the hospital) in his presence, signed cards authorizing the Union to represent them for collective-bargaining purposes. Pekin's recognition and bargaining relationship with the Union is embodied in a number of collective-bargaining agreements, the most recent of which was a 3-year agreement, ratified by the membership to be effective through March 31, 1996. (G.C. Exh. 5(b).)

On or about July 5, 1993, Pekin announced that Respondent, a private company, won the bid to handle the work formerly performed by public employees at the wastewater treatment facility. Respondent contracted with Pekin to ''operate and maintain the Wastewater Treatment Plants, lift stations, and combined sewer overflow stations . . . in accordance with generally accepted practices for wastewater treatment'' for 10 years commencing August 1,[3] with Pekin retaining ownership of the wastewater treatment facilities and equipment. (G.C. Exh. 9.)

Keith Gleason, secretary-treasurer for the Union, contacted Gary Miller, a vice president of Respondent. Gleason testified that Miller told him that he understood that the Union represented the wastewater treatment employees and that they were under contract; that he and Miller made arrangements to meet at the union hall in Peoria on July 20; that Miller requested a copy of the current collective-bargaining agreement covering the unit employees so that he could review it in preparation for their meeting; and that he mailed Miller a copy of the contract along with a cover letter that memorialized their meeting arrangements. (G.C. Exhs. 5(b) and (a), respectively.)

On July 20, Miller and Respondent's executive vice president, Dave Sherman, met with Gleason at the union hall. Gleason testified that he requested that Respondent voluntarily recognize the Union as the exclusive representative of the wastewater treatment employees; that Miller said he had no problem with that, he understood that the Union represented those employees and they were under contract; that he then asked whether they wanted to do a card check and Miller said, ''I don't think we need to get that technical''; that he then asked how many of Pekin's current wastewater treatment employees Respondent planned to hire, indicating that there were five employees in the unit at the time; that Sherman then said that Gasper was being moved into a supervisory position and would not be part of the unit; that Miller and Sherman said that they would (a) be offering employment to all of the wastewater treatment employees, (b) waive the normal probationary period for the employees, and (c) require employees to complete a drug screening; that they began negotiating terms of a contract, with Sherman indicating that he had reviewed the Union's existing contract and (1) the economic package did not seem to be a problem, and (2) there were some things regarding management flexibility that would have to be changed; that they discussed the length of vacations and Respondent's benefit programs being implemented on August 1; and that they agreed that once the parties negotiated a contract it would be retroactive to August 1. Gleason also testified that when the city of Pekin privatized other of its employees in the late 1970s the Union continued to represent the involved employees when they went from public to private and at the time of the hearing herein the Union still represented these employees.

[2] Under the collective-bargaining agreement employees in the wastewater treatment and street departments can transfer between these departments under a bid system.

[3] The agreement called for a renewal for an additional 5 years unless one of the parties gives timely written notice that it will not renew the agreement.

By certified letter dated July 21, General Counsel's Exhibit 6, Gleason advised Miller as follows:

> This letter is to follow up on our meeting yesterday at the Local Union hall concerning our discussions as to J.M.M.'s assumption of the work previously performed by members of Teamsters' Local #627 as employees of the City of Pekin. At that meeting, you agreed, on behalf of J.M.M. Operations Services, Inc. to voluntarily recognize Teamsters Local 627 as the exclusive bargaining representative of the employees J.M.M. intends to utilize to perform said work. You further indicated and agreed that J.M.M. intends to hire the five current employees who are performing said duties on behalf of the City of Pekin and who were previously represented by Teamsters Local 627. In addition, you agreed to maintain a vacancy for the employee within the City bargaining unit who is currently absent due to a worker's compensation claim. Further, you agreed there would be no probationary period with respect to the above employees employment with J.M.M. Inc.
>
> It is also my understanding that J.M.M. has agreed to continue to pay the rate of wages which the City has been paying to these individuals during the bargaining between Teamsters Local 627 and J.M.M. It is my understanding that should the parties fail to arrive at a final agreement on or before August 1, 1993, the employees shall be entitled to J.M.M.'s benefit package (subject to the wage rate cited above) until a new contract is agreed upon. It is my understanding as well that should the benefit package subsequently negotiated between the parties differ from that of the Company's benefit package, that such benefits shall be applied retroactively to August 1, 1993.
>
> If, I am mistaken as to any of my understandings as to the parties' agreement reached at our meeting yesterday, would you contact me immediately so that we might discuss the same. It was a pleasure to meet with you yesterday and I am pleased that the parties appear to be able to amicably resolve any issues which have arisen due to the city's decision to cease performing the Waste Disposal and Lift Station work.[4]

Gleason never received a written reply to this letter.

Sherman gave the following testimony about the July 20 meeting and the above-described July 21 letter:

> During the session as I recall it when Mr. Gleason asked the question about voluntary recognition, Mr. Miller said, ''Well, we understand you are there,'' and at that point in time, I did point out, and as my business card will point out, that Gary Miller was not in the position—later on a letter came to our offices by certification—and again we made the next letter—we said, you know, these things should now go to my attention because I want to make sure there is nothing lost because we have had this thing occur before—
>
> Q. Let's go back to—Mr. Gleason asked you for voluntary recognition?
>
> A. Um-hmm.
>
> Q. What was said in response to that?
>
> A. I think the term—I don't recall off the top of my head if he said voluntary recognition. I think what we said is we understand that the Union is representing the employees, our intent and what we thought was going on during this conversation was the fact that if the employees—because we have typical saying—we do say—like when you go to park somewhere with your car, you put your tag in the same way—we do the same thing in every facility we go after and it is always the same thing. If the guys want to be employed by a Union or represented by a Union, it is fine with us. We don't care if it is Union or non-Union and that is typically where we go.
>
> For us to say that we voluntarily recognize anybody before we have talked with the employees, before we have a contract, is not something that we would do. not something that Mr. Miller would accept. Uh, during when the letter came out, uh, as a matter of fact, uh—
>
> Q. What letter?
>
> A. There was a letter that I finally saw about a week and a half later on the certification—I did ask Mr. Miller if—over the phone—prior to our meeting on the 20th—I think it was the 20th—if there had been any—
>
> MS. ORTIQUE: Objection. Hearsay.
>
> JUDGE WEST: Not being offered for the truth of the matters asserted . . . [?]
>
> MR. BOSCH: No.
>
> JUDGE WEST: Overruled. Answer please.
>
> A. I asked the question, had any formal commitment been made to recognize the Union and to negotiate the contract with the Union and his answer was no.
>
> Q. All right. And when was that?
>
> A. That was sometime after the meeting on the 20th, *when this certified letter came around and I got a cc copy of it.*
>
> Q. *That is the letter dated July 21st? Is that the letter you are talking about?*
>
> A. *I believe so*. One that Mr. Gleason—
>
> Q. Let me show you this letter which has been marked as *General Counsel's Exhibit 6. Is this the letter you are referring to?*
>
> A. Yes. [Emphasis added.]

Miller did not testify at the hearing herein.

On or about July 20 Sherman and Miller met with the wastewater treatment employees to introduce themselves, familiarize the employees with Respondent and its policies and to ask which employees were planning to work for Respondent. The employees and their spouses subsequently went to a dinner meeting at The Chateau Restaurant in Pekin. Donita Wolters, Respondent's human resource manager, and Vince Tovar, Respondent's project manager, were present with Sherman at the restaurant. Gasper, Birkmeier, Wolfer, and their wives attended. The employees were given Respondent's job application and an employee information packet explaining company benefits, including information about Respondent's insurance and pension plans.

During the last week of July, Wolfer and Sherman had a conversation in the maintenance area of the plant about the fact that while Wolfer had a 6-week vacation period with

[4] The employee referred in the first paragraph of the letter as being out on worker's compensation was Yavorshak.

Pekin, Respondent's corporate policy only granted 4 weeks' vacation time. Wolfer testified that he advised Sherman to check with the Union because at the time of the conversation he, Wolfer, was still an employee of the city and he did not want to be caught between the city and the Union or Respondent and the Union. Sherman said he would work on it and that it was up to the employees to decide if they wanted the Union.

On July 27 Sherman telephoned Gleason and asked if he would meet with Sherman and Respondent's attorney, Frederick Bosch, on July 28.

Gleason met Respondent's representatives at the wastewater treatment facility in Pekin on July 28. Wolters was also present at the meeting. Gleason testified that he began the meeting by asking if they had received his, Gleason's, above-described July 21 letter; that Bosch said that he had not seen the letter; that he then gave Bosch a copy; that Bosch read the letter and then said that Respondent could not give voluntary recognition since it was not the employer as of July 28; that he said, ''[T]his was already discussed . . . [t]he Company already recognized us as being the representative of the employees and that they were going to give voluntary recognition and we had begun negotiations and the purpose of the meeting that day was to negotiate''; that Bosch said he could not do that without signed authorization cards; that Sherman then ''spoke up and said that they hadn't given voluntary recognition, that they recognized that we represented these employees but they hadn't agreed to give us voluntary recognition''; that he then pointed out that they had already agreed to a number of things, i.e., who would be offered employment, no probationary period, drug tests, as of August 1 the Company's benefit program would be used and any subsequently negotiated changes would be retroactive to August 1; that he then excused himself and left the room to call his attorney, and when he returned he asked Bosch if Respondent would give voluntary recognition after having a card check; and that Bosch said yes and the parties then made arrangements to have a card check and continue negotiations on Friday, August 6.

On July 29 Wolfer had a job interview with Sherman and Wolters in Gasper's office.

On July 30 Wolfer was offered employment with Respondent by Wolters. Wolters handed Wolfer a letter and asked him to read it and if he agreed with it, to sign it.[5] The letter offered Wolfer a full-time position in the same classification that he worked in for Pekin. Respondent's written offer, General Counsel's Exhibit 3, is dated July 28 at the top of the letter and it is dated ''7-29-93'' at the bottom where Wolfer signed it indicating that he understood it and agreed to the terms. This letter, along with the letters of Yavorshak, and Birkmeier, General Counsel's Exhibits 11(a) and (b),[6] respectively, direct the employees to ''report to the plant manager Mr. Dominick Gasper.'' The letters also indicate that the employees would receive benefits as described in the information previously provided and that they would received full credit for their prior service with the city of Pekin in determining their eligibility for such benefits as vacation and vesting in the pension plan. Gasper's offer letter is dated July 28 at the top of the letter and ''7/29/93'' at the bottom where he signed it. (G.C. Exh. 11(c).) The letter indicates, in part, ''[w]e are pleased to offer you the full-time position as Senior Operations and Maintenance Specialist'' and ''[y]ou will report to the project manager.''

Wolfer testified that when he worked for Pekin union dues were collected through payroll deduction but after August 1 he had to mail his monthly dues to the Union.

Sherman gave the following testimony regarding what the employees said about the Union:

> Q. I'll show you what has been marked as General Counsel's Exhibit 10, and using this list, which employee spoke to you about the Union?
>
> A. Well, basically the only employee on here who spoke to me that indicated that he would prefer to be with the Union and wanted the Union and wanted to fill it out was Larry [Wolfer]. Uh, Mr. Birkmeier and Mr. Gasper had indicated that they, uh, had not, you know, thought it was necessary as a matter of fact I don't recall which of the two gentlemen asked me the question, ''Do I have to join? Do I have to pay dues?''
>
> . . . Don was not—you know, he came in but he was not working. He talked around us and he didn't—I can't recall if he indicated one way or another but Larry was one that I did not had indicated that that was what he felt comfortable with, which was fine.
>
> . . . .
>
> Q. Now between July 20th of 1994 and July 28th of 1994, were you aware of any arguments among employees regarding the Union?
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> . . . .
>
> A. Okay. Yes, I was told that, uh, one of the reasons we were having to visit there was because we were being told that certain members were telling others that they had to join the Union, that there was pressure being—pressure applied, uh, that there were arguments about why do we need them, why they don't need them.
>
> Q. Who are these arguments among?
>
> A. My understanding is that Mike and Larry were at one of them and
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> Q. Excuse me. Last names please.
>
> A. Oh, referring to Mike Birkmeier and Larry Wolfer was one the conversations that I had heard about. Again, second hand. There had been some concerns about whether there should or shouldn't be—
>
> . . . .
>
> Q. On the 28th? Had any employees told you that they did not want to be members of the Union?
>
> A. Yes.
>
> Q. And who were they?

[5] Wolters gave Wolfer a schedule of insurance benefits and premium costs at this meeting. (G.C. Exh. 4.)

[6] Both of these letters are dated July 28 at the top of the letter and ''7/29/93'' at the bottom where the employee signed. Yavorshak began working for Respondent when he returned from workmen's compensation leave about 1 month after Respondent took over the operation. Respondent never hired any additional nonsupervisory, bargaining unit employees other than those who previously worked for Pekin. In November 1993 Respondent hired Gary Heller who worked for Pekin wastewater treatment prior to transferring to the street department. Wolfer, Birkmeier, Yavorshak, and Heller, along with Plant Manager Gasper, were at the wastewater facility at the time of the hearing herein.

A. Mr. Birkmeier and Mr. Gasper.

Q. Did you ever grant voluntary recognition to Mr. Gleason?

A. Not that I am aware of.

Regarding Gasper, Sherman testified as follows on cross-examination:

Q. Mr. Sherman, did you have conversations with Mr. Gasper prior to August 1st, 1993?

A. Yes, I did.

Q. And did you offer him a management position with JMM during your conversations with him?

A. We asked him if he would be interested in a management position I think was the way the wording was said.

Q. Okay. And was it at that time that Mr. Gasper indicated to you that he did not wish to be represented by the Teamsters?

A. I don't recall if it was before then or right at that time. I don't recall. I don't' recall it at that particular session.

. . . .

Q. And Mr. Gasper was hired as a management employee by JMM as of August 1991, was he not?

A. Yes, ma'am.

Q. And he was in the classification of a supervisor, is that correct?

A. Yes. ma'am.

And on recross Sherman testified as follows:

Q. Okay. But in terms of supervisory authority, did he [Gasper] then, in fact, have supervisory authority as of August 1st, 1993?

A. Sure.

On August 4, Bosch telephoned Gleason. Gleason testified that Bosch asked him how things were set for their Friday meeting; that he asked Bosch if he wanted to have a neutral third party conduct the card check; that Bosch then said, ''You know Keith, there are six of those employees''; that he said, ''No, there's not six of those employees. . . . Bud Thomas . . . decided not to go to work for JMM. Uh, Dom Gasper ha[d] gone into a management position and we ha[d] the three employees left''; that Bosch said, ''Well . . . we've got corporate attorneys that we have got to answer to out of Pasadena [and] [y]ou are just going to have to go ahead and file a petition. I hope you don't think I'm jerking you around''; that he then told Bosch ''I think you're jerking me off. I am not going to file a petition. We've been recognized as the labor representative of this group and we have begun contract negotiations, and I am going to file an unfair labor practice charge''; and that he had no further conversations with Respondent's representatives concerning the Union's representation of the involved employees.

Prior to August 1, Pekin's street department had been responsible for eight sewage lift stations throughout the city. As of August 1 this became a responsibility of the wastewater treatment employees. Also after August 1 these employees conducted additional tests which take an hour a day and they have to complete more paperwork than they did while working for Pekin. The belt thickener and vacuum bed operations Pekin had run were done away with. Under Respondent's control the involved plant carries considerably more sludge in the primary clarifiers, and the employees were busier with increased cleaning and maintenance activities. Also, there was more documentation, a work order system was put into place, and changes were made to process control dealing with pumping rates and timers. Respondent has also trained its employees to perform their tasks in a somewhat different manner. And it has also installed a different computer program, as well as a new corrective and preventative maintenance program.

Wolfer testified that after August 1 the involved employees continued to use the same equipment that they had used while employed by Pekin; that Gasper continued to be the supervisor; that the wastewater treatment plant employees worked with the street department employees two or three times a year to blow out the lines in the plant; and that wastewater treatment employees could transfer to the street department and vice versa.

At the end of the hearing herein, counsel for General Counsel agreed that Respondent could set the initial terms and conditions of employment.

Contentions

On brief counsel for General Counsel contends as follows:

The employees of the predecessor employer were employees as defined in the Illinois Public Labor Relations Act (hereinafter referred to as IPLRA), Ill. Rev. Stat. 1989 ch. 48, pars. 1601 through 1627, as amended. They were part of a class of individuals who work either for state, county or municipal employers. As such, they were employees as defined by State statute. Likewise, the predecessor employer, the City of Pekin, Illinois, is representative of the class of public employers that also includes state and county employers. Consequently, the City was also subject to the rulings of the IPLRA.

The Illinois State Labor Relations Board (ISLRB) was created by the IPLRA and has jurisdiction over collective bargaining matters between employee organizations (unions) and units of local government. [G.C. Exh. 7 at p. 1797.] it was created by statute in 1984 for the following purpose:

> [T]o regulate labor relations between public employers and employees, including the designation of employee representatives, negotiation of wages, hours and other conditions of employment, and resolution of disputes arising under collective bargaining agreements [G.C. Exh. 7 at p. 1].

The ISLRB conducts hearings, makes findings of fact, issues decisions, conducts representation elections and certifies labor organizations as the exclusive bargaining representative of public employees. It also permits public employers to give voluntary recognition to labor organizations that, like the Charging Party Union herein, present a claim for representation of a majority of the employees. [G.C. Exh. 7 at p. 1800, part 1609, sec. 9(1) & (2).] The ISLRB's purpose and policies are consistent with those of the Board, albeit to a different category of employees. As such, the State Board proceed-

> ings are entitled to receive the full weight of the Board's authority in this matter.
>
> The predecessor employer and the Charging Party Union herein submitted to the State Board's jurisdiction during a representation matter most recently in November, 1991. In a decision and order styled City of Pekin, Employer and Teamsters #627, Petitioner, [G.C. Exh. 8], the hearing officer made specific reference to the Union's representation of the sewage treatment plant employees. Union Secretary-Treasurer Keith Gleason, participated in the 1991 ISLRB hearing on behalf of the aforementioned municipal employees. He also testified with respect to his ongoing relationship with the ISLRB on behalf of various units of state, county and municipal employees. (Tr. 72) He testified that the Union has continually represented various units of employees when their municipal employers decided to and did privatize operations. Gleason cited three such examples within the Pekin sanitation, street and waste disposal departments. In each instance, the Union continued to represent the former municipal employees under the Board's jurisdiction (Tr. 104–105). Based on the record testimony and supporting exhibits, the State Board's recognition of a lawful bargaining history between the Union and the predecessor should be accorded full legal recognition under the Board's longstanding policy of ceding full weight and comity to the proceedings of a state agency where those proceedings are free of gross deviations from due process requirements. See *St. Joseph's Hospital*, 221 NLRB 1253 (1975); *We Transport, Inc*., 198 NLRB 949 (1972). Furthermore, the IPLRA contains a clause for antecedent agreements, giving full force to any collective bargaining agreements entered into prior to the effective date of the Act. [G.C. Exh. 7 at p. 1808]. The Charging Party Union and the predecessor negotiated agreements covering the wastewater treatment employees dating back to the early 1970s. The State's procedures are similar to those set forth under the NLRA. They are fair and regular, they do not conflict with the mandates of the statute or fundamental Board policies interpreting the NLRA. *St. Joseph's*, supra at 1257. Accordingly, it is the position of Counsel for the General Counsel that comity should be applied to the outstanding relationship between the predecessor and the Union. [Footnote omitted.]

Counsel for General Counsel further contends that when a new employer takes over the business of a formerly unionized operation and does so with a substantial and representative complement of bargaining unit employees, a majority of whom had been similarly employed by the predecessor, the new employer will be considered a 'successor employer' and will inherit certain of the predecessor's bargaining obligations, namely to bargain in good faith with the Union, *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 275 (1987); that from August 1, without a hiatus, Respondent continued to operate the wastewater treatment facility at the same location, utilizing the same equipment and providing services identical to those of the predecessor, the city of Pekin, to the same customers—the residents of Pekin; that Gasper continued to direct the work of the unit employees; that Respondent from the outset indicated that it intended to offer employment to all of the predecessor's employees; that Respondent employed all but one of the bargaining unit employees of the predecessor; that the employees retained their accrued seniority from their employment with the predecessor; that they performed substantially the same work and worked the same hours they did under the predecessor; that the additional paperwork they had to complete after August 1 and the additional duty of maintaining eight lift stations does not alter the fact that the work performed by the water treatment employees was essentially the same before and after Respondent assumed operations; that the United States Supreme Court has held that where other successorship factors are present, the new employer's obligation to bargain attaches when it has hired a ''substantial and representative'' complement within the unit, a majority of which are predecessor employees, *Fall River Dyeing*, supra; that here Respondent contracted to perform the predecessor's operations and when it commenced operations, a substantial continuity was maintained in the employing enterprise; that Respondent offered employment to four of the five employees that formerly worked for the predecessor on July 29 and a majority of those hired by Respondent were members of the bargaining unit; that as in *Fall River*, supra, Respondent only resumed part of the predecessor's former operations but the former bargaining unit was not fragmented and the wastewater treatment plant constitutes a distinct, identifiable group of employees; that therefore, a unit consisting of wastewater treatment employees is an appropriate bargaining unit which has not lost its identity; that Respondent never disavowed the July 20 statements attributed to Miller and, despite his involvement in the negotiations and takeover of operations, Respondent did not call him as a witness during its case in chief; that by August 4 when the Union repeated its request for recognition and bargaining, Respondent employed a substantial and representative complement of employees which triggered an obligation on its part to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees; and that its continued refusal constitutes a violation of Section 8(a)(5) and (1).

Respondent on brief, argues that comity should not be extended to the bargaining relationship between the city of Pekin and Teamsters Local 627 since Pekin's wastewater treatment plant employees were never granted the right to vote on whether they wanted the Union to represent them in that no election was ever held and the agreement between the city of Pekin and the Teamsters was merely extended to the Disposal Plant employees in 1971; that there was no election to be tested against due process requirements and policies of the Act deemed so crucial by numerous Board and court decisions; that JMM is not a successor to the city of Pekin because a private employer cannot be a successor to a public employer; that while the Board has imposed successor status where the predecessor was a public entity and the successor was a private entity, *Harbert International Services*, 299 NLRB 472 (1990), and *Base Services*, 296 NLRB 172 (1989), in each case the predecessor was the United States Army and the Board's rationale for finding successorship was the national defense; that such a rationale is not applicable under these circumstances since no issue as sensitive as the national defense is present on these facts to justify imposing successor status on Respondent; that the city of Pekin

is a political subdivision of the State of Illinois and therefore it is not an employer within the meaning of the Act; that individuals employed by the city of Pekin are, therefore, not employees within the meaning of the Act; that the successor doctrine does not, therefore, apply; that from the employees' perspective, the changes in working conditions and methods of production after August 1 have so altered their job situations that successor status cannot be imposed on Respondent; that Respondent did not wrongfully breach its obligation to bargain with the Union by refusing to bargain or about July 28 because it, Respondent, had a good faith doubt as to the Union's majority status; that the bargaining obligation may be rebutted if the employer affirmatively establishes that at the time it refused to bargain it had a good-faith doubt of the Union's continuing majority status based on objective evidence; that Respondent has such a basis for good-faith doubt in that two of the three individuals who joined JMM on August 1, 1993, told Sherman that they did not want the Union to remain; that contrary to counsel for General Counsel's argument at the hearing herein paragraphs 5(e) and 6 of the complaint against Respondent do not adequately notify the Company that it would have to respond to the issue of whether it had voluntarily recognized the Union as the bargaining representative for its employees and subsequently rescinded that recognition; that Respondent had no notice that it would have to defend such a claim and, therefore, this claim should not be considered; that Respondent could not have possibly granted voluntary recognition at the time in question because it had not yet hired any Pekin employees; and that the only evidence the General Counsel introduced at the hearing to prove that Respondent had granted voluntary recognition was the uncorroborated and incredible testimony of Gleason.

Analysis

Contrary to Respondent's assertion, here the lack of an election is not a fatal flaw since a union's majority status may be established by means other than a Board election; *Mine Workers v. Arkansas Flooring Co*., 351 U.S. 62, 71–72 (1956). As pointed out by the Court, ''[a] Board election is not the only method by which an employer may satisfy itself as to the union's majority status.'' Id. at 72. Here, the majority of the members of this unit signed union authorization cards. It was voluntarily established by the city of Pekin and the Union over 20 years ago and it has had a continuous collective-bargaining history since then. In such circumstances, the Board is not being called upon to establish a unit. *Retail Clerks Local 324*, 144 NLRB 1247 (1963).

Respondent does not specifically urge that the involved unit is inappropriate. Since, as pointed out by counsel for General Counsel, the wastewater treatment plant constitutes a distinct, identifiable group of employees, the unit, in my opinion, is an appropriate bargaining unit.

As pointed out by Respondent, there are Board cases which impose successor status where the predecessor was a public entity and the successor was a private entity. Respondent argues, however, that both of these cases, which are cited above, directly affected the national defense and ''[n]o issue as sensitive as the national defense is present on . . . [the] facts [of this case] to justify imposing successor status on JMM.'' Administrative Law Judge William Cates in *Base Services*, 296 NLRB at 175 and 177 (1989), concluded as follows:

> The Board is not precluded from finding that successorship status exists simply because the predecessor was not covered by the Act. Cf. *Boeing Co*., 214 NLRB 541, 548, 559 (1974).
>
> . . . .
>
> I am persuaded the traditional successorship test is the proper one to be applied in the instant case notwithstanding the fact the predecessor—the Army—was not an employer within the meaning of the Act. Imposing successorship in the instant situation fulfills the purposes of the Act by fostering stability and harmony in labor relations for an employer (Base) who is covered by the Act and which renders services to a customer (the Army) that directly affects national defense. To fail to apply the traditional successorship test in the instant case, merely because the predecessor was from the public sector, would place form over the substantive goals of the Act. Stated differently, the employees of Base which are currently covered by the Act may not be denied the benefits that arise under the successorship doctrine simply because their former employer was from the public sector. Emphasis in successorship cases must be placed upon a determination of continuity of the enterprise rather than upon the source of such employment. In summary, I find that the fact the predecessor and the Union's labor agreement was governed by the FLRA [Federal Labor Relations Act] does not vitally impede the finding, which I make, that Base is the successorship of the Army.[7]

Collectively *Harbert International Services*, supra, and *Base Services*, supra, involved civilian maintenance, supply, transportation, and quality control employees at Fort Leonard Wood in Missouri. Notwithstanding the fact that the service rendered in the instant case does not directly affect the national defense,[8] Judge Cates' reasoning applies here. To reiterate, ''[e]mphasis in successorship cases must be placed upon a determination of continuity of the enterprise rather than upon the source of such employment.''

As concluded by Judge Cates in *Base Services*, supra at 175:

> It is settled law under the Board and court's traditional test that when a new employer takes over the business of a formerly unionized operation and does so with a substantial and representative complement of bargaining unit employees, a majority of whom had been similarly employed by the predecessor, the new employer will be considered a ''successor employer'' and will inherit certain of the predecessor's bargaining obligations. The obligations the successor inherits includes recognizing and bargaining in good faith with the union but does not bind it to the predecessor's collective-bargaining agreement with the union. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and *Fall*

[7] Judge Cates reached the same conclusions in *Harbert International Services*, 299 NLRB at 476 and 480.

[8] Certainly, to the citizens of Pekin anything which affects the operation of their sewage system would be very important.

River Dyeing Corp. v. NLRB, 482 U.S. 27 (1987). In determining whether there is ''substantial continuity'' between the enterprises, the Court-approved approach has been to consider the totality of circumstances with careful consideration given, but not limited to, the following factors: (1) whether there has been a continuation of the same business operations; (2) whether the new employer utilizes the same facilities as the previous employer; (3) whether the new employer utilizes the same or substantially the same work force; (4) whether the same jobs exist under the same working conditions; (5) whether the new employer utilizes the same or substantially the same supervisors; (6) whether the new employer utilizes the same machinery, equipment, and/or methods of production; (7) whether the new employer manufactures the same products, offers the same services, and/or has the same customers; and (8) whether there has been a hiatus between the previous and the new employer's operations. None of these factors is dispositive. See *NLRB v. Band-Age, Inc*., 534 F.2d 1 (1st Cir. 1976), cert. denied 429 U.S. 921 (1976). These factors must be viewed from the employees' perspective, that is whether their job situation has so changed that they would change their attitudes about being represented. See *Derby Refining Co*., 292 NLRB 1015 (1989), see also *NLRB v. Security-Columbian Banknote Co*., 541 F.2d 135 (3d Cir. 1976). A mere change in ownership without an essential change in working conditions would not be likely to change employee attitudes about representation. *NLRB v. Burns Security Services*, supra at 278–279. The presumption about employee attitudes toward representation is necessary to promote stability during changes of employers and to reduce industrial strife. As the Board stated in *Derby Refining Co*., supra.

> Both the Union and the employees are vulnerable during this period and hard-earned bargained-for rights can easily be diminished. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 39 (1987). Employees, especially during such times, are worried about retaining their jobs and may shun the union if they feel it will help their chances of doing so. If no presumption existed, corporation transformation could be used to avoid the union and exploit employees' fears. Id. Such a situation would be conducive to industrial peace.

Viewed from the employees' perspective the changes which occurred with Respondent's takeover of the operation are not so dramatic as to likely affect their views and attitudes about being represented by the Union. The overall method of the operation is substantially the same. Respondent's approach may be more thorough in some regards and not as stringent in other regards but overall there does not appear to be a substantial difference in the operation. I do not believe that Respondent's takeover of the operation of the eight lift stations considered either alone or in conjunction with the other changes warrants a finding that Respondent is not a successor. After consideration of the above-described factors, I conclude that there is substantial continuity between Pekin and the Respondent.

Contrary to the its assertion, Respondent did not have a good-faith doubt about the Union's majority status. Gasper understood that he was being hired as a supervisor. Also, Respondent informed the Union on July 20 that Gasper was being hired as a supervisor and he would not be in the unit. Consequently, Gasper's expressions regarding his feelings about the Union are not relevant. As noted above, documentary evidence introduced herein shows that at the end of July 1993 Respondent offense positions to three employees and the three employees, Wolfer, Yavorshak,[9] and Birkmeier, accepted the offers. According to Respondent's evidence, only one of these three, Birkmeier, told Respondent's management that he did not want to be a member of the Union.

The following footnote 3 appears at page 7 of Respondent's brief:

> Mr. Gleason testified without corroboration that this letter [G.C. Exh. 6] had been sent to JMM personnel by certified mail, return receipt requested, on July 21, 1993. [T-85, 86.] Mr. Gleason was unable to produce a return receipt card. [T-96, 97.] JMM never received such a letter. [T-87, 97.] [The bracketed transcript cites are in original.]

Contrary to Respondent's assertion on brief, Sherman's testimony, as set forth above, demonstrates that JMM did receive the letter. In my opinion, the July 2 letter was received by Respondent before the July 28 meeting. In my opinion, the July 21 letter was the reason Sherman requested on July 27 the July 28 meeting.[10] Miller, as the July 21 letter indicates, agreed on behalf of JMM Operations Services, Inc., to voluntarily recognize the Union as the exclusive bargaining representative of the employees JMM intended to utilize to operate the sewage treatment plant. Sherman was at the July 20 meeting. He did not say or do anything which would have indicated to Gleason that the position taken by Miller was not the position of Respondent. Sherman was not a credible witness. I do not credit his testimony that he was not ''aware of'' granting voluntary recognition to the Union on July 20. Sherman does not deny Gleason's testimony that Sherman began negotiating a collective-bargaining agreement on July 20. If there was no recognition, why would Respondent have engaged in this exercise. Sherman did not tell Wolfer that it was up to the employees to decide if they wanted a union until the last week in July. The week before that Respondent had recognized the Union and commenced bargaining with it. In my opinion, Sherman's statement to Wolfer was nothing more than an attempt on Respondent's part to belatedly bolster its position that it did not recognize the Union on July 20. Citing *MK-Ferguson Co*., 296 NLRB 776 (1989), Respondent argues that it never extended voluntary recognition to the Union because at the time of the alleged grant of voluntary recognition it had not yet hired any Pekin employees. In *MK-Ferguson Co*., supra, the Respondent therein indicated that it intended to hire the involved employees if it was the successful bidder. There it was concluded that there was no

[9] Yavorshak was to report when he came off workmen's compensation.

[10] As noted above, the third paragraph of Gleason's July 21 letter begins with ''[i]f I am mistaken is to any of my understandings as to the parties' agreement reached at our meeting yesterday, would you contact me immediately so that we might discuss the same.''

way of knowing when it indicated its intent that it would be the successful bidder. Here, in contrast JMM had already won the bid. It was not a matter of speculation. On July 20 JMM was in a position to make offers and receive acceptances from the involved employees. Respondent did not begin to operate the plant until August 1 but that did not preclude it from hiring employees before that date. Respondent did in fact hire employees at the end of July 1993. On July 20 Respondent was in a position to and did voluntarily recognize the Union as the exclusive representative of the involved employees. By August 1 Respondent took over the involved operation and it did so with a substantial and representative complement of bargaining unit employees, all of whom had been similarly employed by the predecessor. Respondent is a successor employer.

In my opinion Respondent violated the Act as alleged. Respondent is obligated to recognize and bargain with the Union as the exclusive representative of the appropriate unit of employees described below.

CONCLUSIONS OF LAW

1. JMM Operational Services, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 627 is a labor organization within the meaning of Section 2(5) of the Act.

3. JMM Operational Services, Inc. is the successor of the city of Pekin.

4. All full-time and regular part-time employees employed by the Employer at the Pekin, Illinois wastewater treatment facility, excluding all professional employees, guards, and supervisors as defined in the Act constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

5. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 627 has been, and is, the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

6. By refusing since about July 28 and August 1 and at all times thereafter, to recognize and bargain collectively with the above-named labor organization as the exclusive representative of all its employees in the appropriate unit, JMM Operations Services, Inc. has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that JMM Operational Services, Inc. has engaged in certain unfair labor practices, I shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I shall order JMM Operational Services to recognize and, on request, to bargain with the Union as the exclusive representative of all its employees in the appropriate unit, which unit is described elsewhere in this decision. I shall also order that JMM Operational Services, Inc. post a notice to employees attached as an appendix for 60 days in order that employees may be apprised of their rights under the Act and JMM Operational Services, Inc.'s obligation to remedy its unfair labor practices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, JMM Operational Services, Inc., Pekin, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain in good faith with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 627 as the exclusive bargaining representative of the employees in the bargaining unit described elsewhere in this decision.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time employees employed by the Employer at the Pekin, Illinois wastewater treatment facility, excluding all professional employees, guards and supervisors as defined in the Act.

(b) Post at the Pekin, Illinois wastewater treatment facility copies of the attached notice marked ''Appendix.''[12] Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and, on request, bargain in good faith with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 627 as the exclusive bargaining representative of the employees in the bargaining unit described below:

> All full-time and regular part-time employees employed by the Employer at the Pekin, Illinois wastewater treatment facility, excluding all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 627 and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit described above.

JMM OPERATIONAL SERVICES, INC.